



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAY 15 2007

Cleta Mitchell, Esq.
Foley & Lardner, LLP
3000 K Street, N.W., Suite 500
Washington, DC 20007

Re: MUR 5788
Rick Santorum
Santorum 2006 and Gregg R. Melinson,
in his official capacity as treasurer

Dear Ms. Mitchell:

On August 10, 2006, the Federal Election Commission ("Commission") notified your clients, Rick Santorum and Santorum 2006 and Gregg R. Melinson, in his official capacity as treasurer ("the Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On April 17, 2007, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Rick Santorum and the Committee violated 2 U.S.C. § 441a(f), and that there is no reason to believe the Committee violated 2 U.S.C. § 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
General Counsel

A handwritten signature in black ink, appearing to read "Ann Marie Terzaken".

BY: Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** Santorum 2006 and MUR 5788
5 Gregg R. Melinson,
6 in his official capacity as treasurer
7 Rick Santorum
8

9 **I. INTRODUCTION**

10
11 The complaint in this matter alleges that Rick Santorum and Santorum 2006 ("the
12 Committee") and Gregg R. Melinson, in his official capacity as treasurer ("Respondents"), received
13 an excessive in-kind contribution in the form of a coordinated communication, and that the
14 Committee failed to report such a contribution. Based on the reasons outlined below, the
15 Commission found no reason to believe that the costs of the mailer constituted an unreported
16 excessive in-kind contribution and closed the file.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Facts**

19
20 Rick Santorum and Bob Casey, Jr. were candidates for the U.S. Senate seat in Pennsylvania
21 in the 2006 general election. Prior to that election, the Republican Federal Committee of
22 Pennsylvania ("RFCP") prepared and disseminated a mailer that focuses on the immigration
23 amnesty issue, contrasting Santorum's and Casey's positions on the issue. The mailer includes a
24 picture of, and a first-person statement from, Rick Santorum, headed "An important message from
25 Rick Santorum," in which he describes his position on immigration amnesty. He states "Bobby
26 Casey has joined Ted Kennedy and other liberals in supporting this bill." He concludes by urging
27 the reader to "log on to RickSantorum.com and sign a petition uniting the thousands of

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1 Pennsylvanians who are expressing opposition to granting amnesty to those who have entered our
2 country illegally.”

3 The first page of the mailer states in bold lettering “Bobby Casey has come out in support of
4 **AMNESTY** for those who have entered our county **ILLEGALLY**,” and contains a picture of Casey
5 superimposed on a broken barbed wire fence. To the right of the Casey photograph, the mailer
6 includes the statement “Paid for by Republican Federal Committee of Pennsylvania-Victory 2006,”
7 which is displayed within a printed box. The RFCP’s street address appears at the top of the page.

8 The remainder of the mailer discusses the purported immigration amnesty positions of
9 Santorum and Casey. In stating “Rick Santorum is going to do everything he can to keep this
10 terrible piece of legislation from ever becoming law,” the RFCP directs the reader to “Join Rick
11 Santorum and **STOP** this legislation” (emphasis in the original) and “Go to RickSantorum.com and
12 sign the petition.” In describing Casey’s position, the mailer asks “What is Bobby Casey
13 **THINKING?**” It then states, “Casey has come out in support of **AMNESTY** for illegal
14 immigrants,” and “we can only assume” that this action is “payback for all the liberal money that
15 has been flowing into Casey’s Senate campaign.” The mailer provides a bullet-point description of
16 the legislation, and also states, “You’d better be sitting down!” as it criticizes Casey’s support of the
17 amnesty legislation.

18 The complaint alleges that the mailer was coordinated by the RFCP and Santorum because
19 Santorum’s statement shows he was “materially involved” in the communication, meeting the
20 conduct prong of the coordinated communications regulation at section 109.21. *See* 11 C.F.R.

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1 § 109.37(a)(3). The complaint also alleges that the regulation's content prong was met because the
2 mailer "includes a prominent advertisement for Santorum's website," and that website contains
3 express advocacy.

4 The Respondents maintain that they did not violate any provision of the Federal Election
5 Campaign Act of 1971 as amended ("Act") with respect to the mailing, noting that the
6 communication was not an expenditure and not subject to the Act's reporting requirements.
7 Santorum Respondents' Response. *See* 11 C.F.R. §§ 100.87(a) and 100.147 (exempting "volunteer
8 materials" from the definitions of "contribution" and "expenditure").

9 **B. Analysis**

10 Under the Act, state and national party committees may each make coordinated expenditures
11 in connection with the general election campaign of a Senate candidate affiliated with the party of
12 up to the greater of \$20,000 or two cents multiplied by the voting age population of the state.
13 2 U.S.C. § 441a(d)(3)(A). In 2006, the maximum limit of coordinated expenditures that RFCP, a
14 state political party committee, and the National Republican Senatorial Committee ("NRSC"), a
15 national political party committee, could each spend with respect to Santorum's general election
16 campaign was \$761,500. *See* 2006 Coordinated Party Expenditure Limits, The (FEC) Record, 5-6
17 (March 2006). The state and national party may assign some or all of their respective expenditure
18 limits to each other. 11 C.F.R. § 109.33(a). A party coordinated expenditure on behalf of a
19 candidate in excess of the party's limit, either its own or as augmented by assignment, constitutes an
20 in-kind contribution to the candidate, 11 C.F.R. § 109.37(b), and as such is subject to the \$5,000

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1 contribution limit at 2 U.S.C. § 441a(a)(2)(A).¹

2 According to its FEC disclosure reports, on August 4, 2005, the RFCP contributed \$5,000
3 directly to the Santorum Committee for the general election. As for its coordinated party
4 expenditures, the RFCP authorized the NRSC to spend the maximum limit of \$761,500 on its
5 behalf. The NRSC disclosed coordinated expenditures in connection with Santorum's 2006 U.S.
6 Senate campaign that totaled \$1,505,050. In sum, the NRSC and the RFCP collectively made
7 coordinated expenditures for the Santorum Committee below the maximum limit of \$1,523,000
8 (\$761,500 x 2) by \$17,950 (\$1,523,000 - \$1,505,050). Thus, if the mailer does not constitute
9 exempt activity, was coordinated with the Santorum Committee, and cost in excess of \$17,950,
10 Santorum and the Santorum committee would have would have received an excessive contribution
11 from the RFCP. It appears from the RFCP's disclosure reports that postage alone for the mailer cost
12 in excess of \$35,000.

13 Section 109.37 of the Commission's regulations provide that a political party committee's
14 public communication is coordinated with a candidate, an authorized committee or agent thereof if
15 it meets a three-part test: (1) payment by a political party committee or its agent; (2) satisfaction of
16 one of three "content" standards; and (3) satisfaction of one of six "conduct" standards in 11 C.F.R.
17 § 109.21(d)(1) through (d)(6).²

¹ This provision of the Act applies to multicandidate committees such as the RFCP. See 2 U.S.C. § 441a(a)(4)(A).

² The coordination allegation is properly analyzed under section 109.37, which applies to "party coordinated communications," rather than section 109.21, cited in the complaint

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1 In this matter, the first prong of the coordinated communication test is satisfied because the
2 RFCP, which paid for the mailer, is a political party committee. The third prong of this test, the
3 conduct standard, also appears to be satisfied because the inclusion of a first-person statement from
4 Santorum indicates that he or his campaign was “materially involved” with the communication, and
5 Respondents do not deny this characterization in their response.³ Therefore, a reason to believe
6 finding that the mailer was a coordinated communication depends, at this stage, on an analysis of
7 whether the “content” prong of the coordinated communications test was met.

8 Of the three content standards, there has not been a claim, nor is there any evidence to
9 support, that the mailer disseminates or distributes, in whole or in part, any Santorum campaign
10 materials. *See* 11 C.F.R. § 109.37(a)(2)(i). The communication also fails to meet the content
11 standard in section 109.37(a)(2)(iii) because the available information indicates that it was
12 disseminated more than 90 days before an election.⁴

13 That leaves section 109.37(a)(2)(ii)—“a public communication that expressly advocates the
14 election or defeat of a clearly identified candidate for Federal office”—as the only remaining content
15 standard. However, the complaint’s position that the express advocacy in this matter flows from the

³ The Respondents also do not maintain that Santorum’s statement was a response to an inquiry about his position on legislative or policy issues. *See* 11 C.F.R. § 109.37(a)(3).

⁴ The Commission recently revised its coordination regulations. *See* Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33198 (June 8, 2006) (“Revised Coordination E&J”). In the case of communications that refer to Senate candidates, pursuant to the revised regulations at section 109.37(a)(2)(iii)(A), the period begins 90 days before each of the primary and the general elections and runs through the date of each election, respectively. Prior to the revised coordination regulations, a public communication that referred to a clearly identified Federal candidate that was disseminated within 120 days before an election, and that was directed to voters in the jurisdiction of the clearly identified candidate, met the “content” standard for a coordinated communication. The revised regulations became effective on July 10, 2006. The complaint in this matter was dated July 31, 2006, indicating that the communication was publicly distributed before July 31, 2006, but likely after July 10, 2006. Given that Pennsylvania’s primary election had already taken place on May 16, 2006, the next election was the November 7, 2006 general election. Since that election was more than 90 days after the July 31, 2006 complaint, it appears that the mailer was distributed outside of the time period specified in 11 C.F.R. § 109.37(a)(2)(iii).

1 candidate's website referenced in the mailer is misplaced. The public communication at issue here
2 is the mailer itself, and it does not contain express advocacy.

3 Under the Commission's regulations, a communication contains express advocacy when it
4 uses phrases, campaign slogans or words, "which in context can have no other reasonable meaning
5 than to urge the election or defeat of one or more clearly identified candidate(s)...." *See* 11 C.F.R.
6 § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *see also* *FEC v. Massachusetts Citizens*
7 *for Life, Inc.*, 479 U.S. 238, 249 (1986) ("MCFL"). The Commission's regulations further define
8 express advocacy as a communication, "when taken as a whole and with limited reference to
9 external events, such as the proximity to the election," that contains an "electoral portion" that is
10 "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable
11 minds could not differ as to whether it encourages actions to elect or defeat one or more clearly
12 identified candidates, or encourages some other kind of action." 11 C.F.R. § 100.22(b).

13 The mailer in question does not contain phrases, slogans or words that explicitly or "in
14 effect" urge the election of Rick Santorum or the defeat of Bob Casey. *See* 11 C.F.R. § 100.22(a).
15 Rather, it prominently directs readers to "Join Rick Santorum and STOP this legislation" (emphasis
16 in the original) and "Go to RickSantorum.com and sign the petition." Despite the fact that the
17 communication clearly identifies two candidates for Federal election and a reference to "Casey's
18 Senate campaign," the overwhelming focus of the communication is on the immigration issue and
19 Santorum's and Casey's contrasting positions on that issue; it does not tell readers for whom to
20 vote. While the communication conveys RFCP's apparent preference for Santorum's position on
21 the amnesty immigration issue, that alone does not constitute express advocacy.

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1 What is critical in this matter is that reasonable minds could differ as to whether the mailer
2 encourages electoral, or some other action. *See* 11 C.F.R. § 100.22(b). At the time that this mailer
3 was disseminated by the RFCP, the legislation in issue, S.2611, had passed in the Senate and a
4 companion bill had recently been introduced in the House of Representatives. As such, it was still a
5 live legislative issue that could have been stopped. Additionally, the immigration amnesty issue
6 was one that had garnered both bipartisan support and opposition, especially given that Senators
7 McCain and Kennedy were among the co-sponsors of S.611. Against this backdrop, readers could
8 reasonably view the communication as encouraging them to advance Santorum's and the RFCP's
9 agenda of stopping immigration amnesty legislation, not encouraging them to vote for or against one
10 of the candidates. Indeed, it is possible that readers that would not vote for Santorum would still
11 agree with him and the RFCP on this issue and sign the petition.

12 Since the mailer does not meet the content prong of the coordinated communications
13 regulation, a coordinated communication did not occur. Given this conclusion, the Commission
14 need not reach the issue of the applicability of the volunteer materials exemption in this context,
15 because, in the absence of coordination, there was no "contribution" to exempt.

16 Therefore, there is no reason to believe that Rick Santorum and Santorum 2006 and Gregg
17 R. Melinson, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f) by receiving an
18 excessive in-kind contribution in the form of a coordinated communication, and that the Committee
19 violated 2 U.S.C. § 434(b) by failing to report such a contribution.